# Mohd Afrizan bin Hussain v Thein Hong Teck & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-322–02 OF 2013 AND W-02(IM)(NCC)-323–02 OF 2013

ALIZATUL KHAIR, ABDUL AZIZ ABDUL RAHIM AND VARGHESE GEORGE JJCA

26 APRIL 2017

*Agency — Power of attorney — Power of attorney granted by partner of firm — Partner of firm sold and absolutely assigned his rights title and interests in partnership to a company and made director of company his attorney to do all things necessary to give effect to assignment — PA also contained general words appearing to confer general powers to attorney to exercise powers and rights of donor as partner in firm — Donor of PA later adjudicated bankrupt — Whether attorney replaced bankrupt partner as partner in firm — Whether PA had to be strictly construed as giving only such authority as it expressly or impliedly conferred — Whether general words in PA did not confer general powers but were limited to purpose for which authority was given — Whether attorney could only do such things as were necessary to achieve purpose set out in deed of assignment — Whether assignee of partner's share in partnership did not automatically replace partner as member of the partnership unless there was specific partnership agreement to that effect*

*Partnership — Winding up — Unregistered company — Application by creditor to wind up partnership for not settling debt — Whether partnership having only five members at time of presentation of winding up petition was an 'unregistered company' under s 314(1) of Companies Act 1965 capable of being wound up under s 315(1) — Whether for purposes of determining partnership had how many members at time of presentation of winding up petition official assignee as trustee of bankrupt partner could be counted as a member — Whether party to whom one partner sold and absolutely assigned his rights, title and interests in partnership could also be counted as a member*

The respondents and two others ('Syed Kharul Azhar' and 'Yee Chang Man') formed a partnership ('ARCI Enterprise') in October 1992 for a fixed term of eight years to carry out gold mining on a piece of land in Pahang. On 30 January 1997, Syed Kharul Azhar executed a deed of assignment ('the assignment') selling off his rights, title and interests in the partnership for a consideration of RM4m to one of the appellants herein, Tra Mining (M) Sdn Bhd ('Tra Mining'). By a power of attorney ('the PA') executed on the same date, Syed Kharul Azhar named a director of Tra Mining, Cedric Williamson,

as his attorney 'to do and perform all acts or things and/or exercise all powers and rights of the Donor as a partner of the partnership'. A month after the assignment and the PA were executed, Tra Mining signed a joint venture agreement with the partners of ARCI Enterprise to continue carrying out the gold mining operations. On 29 July 2004, after the eight-year fixed term of the partnership had ended, the original seven partners registered a second partnership with the same name for a period of one year. In January 2006, a third partnership, again using the same name, was registered for a period of one year but this time by only five partners in ARCI Enterprise because in July 2003 and April 2005, respectively, Yee Chang Man and Syed Kharul Azhar were adjudicated bankrupts and were thus disqualified from being partners by s 38(1)(d) of the Bankruptcy Act 1967. Meanwhile, on 16 April 2007, Tra Mining petitioned the High Court to wind up ARCI Enterprise on the ground the latter owed it RM6m and could not settle the sum. In its petition, made pursuant to ss 314 and 315 of the Companies Act 1965 ('the CA'), Tra Mining expressly stated that ARCI Enterprise consisted of only five partners, excluding Syed Kharul Azhar and Yee Chang Man. The High Court ordered ARCI Enterprise to be wound up and appointed the other appellant herein, Mohd Afrizan bin Hussain ('Mohd Afrizan') as its liquidator. After ARCI Enterprise failed to set aside the winding up order, the respondents, as contributories of the partnership, filed a writ action against Tra Mining and Mohd Afrizan to, inter alia, declare invalid and set aside both the winding up order and Mohd Afrizan's appointment as liquidator. The High Court set aside the winding up order holding that it was made without jurisdiction. The court held that at the time the winding up petition was presented, ARCI Enterprise only had five partners, following the bankruptcies of Syed Kharul Azhar and Yee Chang Man, and therefore the partnership could not qualify as an 'unregistered company' under s 314(1) of the CA (which required more than five members in the partnership) and, consequently, could not be wound up under s 315 of the CA. The sole issue in the instant appeal was whether that decision of the High Court was right. The respondents argued that the decision was wrong because, inter alia: (a) by virtue of the assignment and the PA, Cedric Williamson had substituted Syed Kharul Azhar as a partner in ARCI Enterprise; and (b) Syed Kharul Azhar's position as partner was preserved by virtue of the official assignee's 'sanction' in a letter dated 18 May 2007.

**Held**, dismissing the appeal:

(1) The court concurred with the High Court's finding that at the time of presentation of the winding up petition there were only five partners in ARCI Enterprise and by virtue of s 314 of the Companies Act 1965 ('the CA'), it was not a partnership that could be wound up under s 315 of the CA. As correctly found by the High Court, the winding up order was made without jurisdiction and was therefore null and void (see para 55).

(2) The requirement for having more than five members in the partnership at the time of presentation of the winding up petition had to be complied with. In the instant case, it was undeniable that at the time of the presentation, there were only five partners who were solvent. The authorities have established that 'members' could not include the trustees of bankrupt members; hence the official assignee, who took on the role as trustee in the bankruptcy of Syed Kharul Azhar, could not be considered as a 'member' and, by necessary implication, regardless of whether Tra Mining had obtained the official assignee's sanction, Tra Mining (or, for that matter, the bankrupt partner himself) could not be regarded as a 'member' for the purpose of determining the number of members required under s 314 of the Companies Act 1965 (see paras 51–52).

(3) It was clear from cl 1 of the PA that the Donor, ie Syed Kharul Azhar, had remained a partner of ARCI Enterprise. Clause 1 read, inter alia, as follows: 'To do and perform all acts or things and/or all the powers and rights of the Donor as a Partner of the Partnership ...'. Cedric Williamson's appointment as attorney was tied up with the deed of assignment, cl 6 of which expressly stated that the appointment was to enable the attorney 'to do and sign all things or documents required by the first defendant (Tra Mining) as assignee and to give effect to the absolute assignment in cl 5(l)'. Clause 1 to 6 of the PA, however, was drafted in general words which appeared to confer general powers to the attorney to exercise all the powers and rights of the assignor-donor as a partner in the partnership. Powers of attorney had to be strictly construed and interpreted as giving only such authority as they conferred expressly or by necessary implication. It was an entrenched rule of construction that general words did not confer general powers but were limited to the purpose for which the authority was given. The purpose here was set out in cl 6 of the said assignment (see paras 36–37 & 41).

(4) According to the fundamental principles of partnership law, subject to any agreement express or implied between the partners, no person could be introduced as a partner without the consent of all existing partners. An attempt by one partner to introduce a new partner without consent amounted only to an assignment of his part of the share in the partnership. The fact that Cedric Williamson signed the JV agreement as Syed Kharul Azhar's attorney did not mean the other partners had consented to or even acknowledged him as a partner in place of Syed Kharul Azhar. There was also no evidence in this case of any partnership agreement that gave any of the partners the right to constitute any third party as a partner in his place (see paras 39–40 & 43).

(5) The alleged 'sanction' that Tra Mining had obtained from the official Assignee was, in fact, no sanction at all. The letter issued by the Director General of Insolvency merely 'acknowledged' that Tra Mining was the

rightful owner of Syed Kharul Azhar's rights and interests in ARCI Enterprise pursuant to the deed of assignment entered into between the parties previously. But being the rightful owner of a bankrupt partner's rights and interests pursuant to an absolute assignment did not automatically turn an assignee into a partner. Furthermore, the alleged 'sanction' was only obtained on 18 May 2007, which was after the presentation of the winding up petition on 16 April 2007 (see paras 51 & 53–54).

(6) Due to the personal character than underpinned a partnership, an assignment by a partner of his partnership share entitled the assignee to limited rights only. If a partner assigned his share, he thereby conferred on the assignee a right to payment of what, upon the taking of the accounts of the partnership, might be due to the assignor. But the assignee acquired no other right than this; and he took subject to the rights of the other partners; and would be affected by equities arising between the assignor and his co-partners subsequent to the assignment, whether the assignment was absolute or otherwise. Although the assignee did not become a partner in place of the assignor, he effectively stood in his shoes and was accordingly bound to indemnify the assignor against any liability for the partnership debts. In this way, the assignee was indirectly liable for the assignor's share of any losses. It was only in this sense that the assignee stepped into the shoes of the partner and not that the assignee became a partner in place of the assignor (see para 42).

**[Bahasa Malaysia summary**

Pihak responden dan dua yang lain ('Syed Kharul Azhar' dan 'Yee Chang Man') telah menubuhkan suatu perkongsian ('ARCI Enterprise') pada Oktober 1992 untuk suatu tempoh selama lapan tahun untuk menjalankan pelombongan emas pada sebidang tanah di Pahang. Pada 30 Januari 1997, Syed Kharul Azhar telah menandatangan suatu surat ikatan penyerahhakan ('surat ikatan') yang menjual hak, hakmilik dan kepentingannya dalam perkongsian itu untuk suatu balasan berjumlah RM4 juta kepada salah seorang perayu dalam kes ini, Tra Mining (M) Sdn Bhd ('Tra Mining'). Berdasarkan suatu surat kuasa wakil ('surat kuasa') yang ditandatangan pada tarikh yang sama, Syed Kharul Azhar telah menamakan seorang pengarah Tra Mining, Cedric Williamson, sebagai peguamcaranya untuk membuat dan melaksanakan semua perbuatan atau perkara dan/atau melaksanakan semua kuasa dan hak Donor sebagai salah seorang rakan kongsi dalam perkongsian itu. Sebulan selepas surat ikatan dan surat kuasa ditandatangan, Tra Mining telah membuat suatu perjanjian kerjasama dengan rakan kongsi ARCI Enterprise untuk meneruskan operasi kerja pelombongan emas itu. Pada 29 Julai 2004, selepas tempoh lapan tahun perkongsian itu tamat, tujuh orang rakan kongsi asal mendaftarkan suatu perkongsian kedua menggunakan nama yang sama untuk tempoh satu tahun. Pada Januari 2006, perkongsian ketiga, sekali lagi menggunakan nama yang

A sama, telah didaftarkan untuk tempoh setahun namun kali ini hanya oleh lima rakan kongsi ARCI Enterprise sahaja kerana pada Julai 2003 dan April 2005, masing-masing, Yee Chang Man dan Syed Kharul Azhar telah diputuskan sebagai seorang bankrap dan oleh itu tidak layak daripada menjadi rakan kongsi menurut s 38(1)(d) Akta Kebankrapan 1967. Sementara itu, pada
B 16 April 2007, Tra Mining telah memfailkan petisyen memohon Mahkamah Tinggi untuk menggulung ARCI Enterprise atas alasan pihak ARCI Enterprise berhutang dengannya sebanyak RM6 juta dan tidak dapat menyelesaikan hutang itu. Dalam petisyen itu, yang dibuat menurut ss 314 dan 315 Akta Syarikat 1965 ('AS'), Tra Mining telah menyatakan dengan jelas bahawa ARCI
C Enterprise hanya terdiri daripada lima orang rakan kongsi sahaja, tidak termasuk Kharul Azhar dan Yee Chang Man. Mahkamah Tinggi memerintahkan ARCI Enterprise digulung dan melantik perayu yang lain dalam kes ini, Mohd Afrizan bin Hussain ('Mohd Afrizan') sebagai pelikuidasi. Selepas ARCI Enterprise gagal untuk mengenepikan perintah penggulungan
D itu, pihak responden, sebagai penyumbang kepada perkongsian itu, telah memfailkan writ saman terhadap Tra Mining dan Mohd Afrizan, antara lain, mengisytiharkan bahawa perintah penggulungan itu tidak sah dan mengenepikan kedua-dua perintah penggulungan dan pelantikan Mohd Afrizan sebagai pelikuidasi. Mahkamah Tinggi telah mengenepikan perintah
E penggulungan itu dan memutuskan bahawa perintah itu telah dibuat tanpa bidang kuasa. Mahkamah memutuskan bahawa pada masa petisyen penggulungan dikemukakan, ARCI Enterprise hanya mempunyai lima orang rakan kongsi, setelah Syed Kharul Azhar dan Yee Chang Man diisytiharkan bankrap, dan oleh itu perkongsian itu tidak layak untuk dikategorikan sebagai
F 'syarikat tidak berdaftar' di bawah s 314(1) AS (yang menghendaki lebih daripada lima rakan kong dalam perkongsian itu) dan, selanjutnya, tidak boleh digulung di bawah s 315(1) AS. Satu-satunya isu dalam rayuan ini adalah sama ada keputusan Mahkamah Tinggi itu betul. Pihak responden menghujahkan bahawa keputusan itu adalah salah kerana, antara lain: (a) menurut surat ikatan
G dan surat kuasa, Cedric Williamson telah menggantikan Syed Kharul Azhar sebagai seorang rakan kongsi di ARCI Enterprise; dan (b) kedudukan Syed Kharul Azhar sebagai rakan kongsi telah diselamatkan menurut sanksi oleh pegawai pemegang harta dalam suatu surat bertarikh 18 Mei 2007.

H **Diputuskan**, menolak rayuan ini:

(1) Mahkamah bersetuju dengan dapatan Mahkamah Tinggi bahawa pada ketika petisyen penggulungan itu dikemukakan, hanya terdapat lima orang rakan kongsi dalam ARCI Enterprise dan menurut s 314 AS, ia
I bukanlah suatu perkongsian yang boleh digulung di bawah s 315 AS. Sebagaimana didapati dengan betul oleh Mahkamah Tinggi, perintah penggulungan itu dibuat tanpa bidang kuasa dan oleh itu terbatal dan tidak sah (lihat perenggan 55).

(2) Kehendak untuk mempunyai lebih daripada lima orang rakan kongsi

semasa petisyen penggulungan dikemukakan hendaklah dipatuhi. Dalam kes ini, tidak dapat dinafikan bahawa pada masa pengemukaan itu, hanya terdapat lima orang rakan kongsi yang solven. Pihak berkuasa telah membuktikan bahawa 'anggota' tidak termasuk pemegang amanah kepada anggota yang bankrap; oleh itu pegawai pemegang harta, yang berperanan sebagai pemegang amanah dalam hal kebankrapan Syed Kharul Azhar, tidak boleh dipertimbangkan sebagai seorang 'anggota' dan, menurut implikasi yang sewajarnya, tidak kira sama ada Tra Mining telah mendapat sanksi daripada pegawai pemegang harta, Tra Mining (atau, bagi maksud ini, rakan kongsi yang bankrap itu sendiri) tidak boleh dianggap sebagai seorang 'anggota' bagi maksud menentukan bilangan anggota yang dikehendaki di bawah s 314 Akta Syarikat 1965 (lihat perenggan 51–52).

(3) Adalah jelas dalam klausa 1 surat kuasa bahawa Donor, ie Syed Kharul Azhar, tetap kekal sebagai seorang rakan kongsi di ARCI Enterprise. Klausa 1 menyatakan, antaranya, seperti yang berikut: 'To do and perform all acts or things and/or all the powers and rights of the Donor as a Partner of the Partnership ...'. Pelantikan Cedric Williamson sebagai peguamcara telah diikat kepada surat ikatan penyerahhakan, klausa 6 menyatakan dengan jelas bahawa pelantikan itu untuk membolehkan peguamcara 'to do and sign all things or documents required by the first defendant (Tra Mining) as assignee and to give effect to the absolute assignment in cl 5(l)'. Klausa 1 hingga 6 surat kuasa, walau bagaimanapun, telah dibuat dalam perkataan yang umum yang kelihatan memberikan peguamcara kuasa untuk melaksanakan semua kuasa dan hak seorang penyerah hak-pemberi sebagai seorang rakan kongsi dalam perkongsian. Surat kuasa wakil hendaklah ditafsirkan dengan ketat sebagai memberi kuasa yang dinyatakan dengan nyata atau implikasi yang sewajarnya. Adalah suatu peraturan pentafsiran bahawa perkataan yang umum tidak boleh memberi kuasa yang umum tetapi terhad kepada sebab suatu kuasa itu diberi. Sebab ada dinyatakan dalam klausa 6 surat ikatan itu (lihat perenggan 36–37 & 41).

(4) Menurut prinsip asas undang-undang perkongsian, tertakluk kepada apa-apa perjanjian nyata atau tersirat antara rakan kongsi, tiada orang yang boleh diperkenalkan sebagai seorang rakan kongsi tanpa persetujuan rakan kongsi sedia ada. Percubaan oleh seorang rakan kongsi untuk memperkenalkan seorang rakan kongsi baharu tanpa persetujuan terjumlah kepada suatu ikatan kepada bahagiannya dalam perkongsian itu. Fakta bahawa Cedric Williamson menandatangan perjanjian kerjasama sebagai peguamcara Syed Kharul Azhar tidak bermakna bahawa rakan kongsi yang telah bersetuju atau mengakui Cedric Williamson sebagai seorang rakan kongsi menggantikan Syed Kharul Azhar. Tidak terdapat keterangan dalam kes ini mengenai apa-apa perjanjian perkongsian yang memberi mana-mana rakan kongsi hak

untuk menjadikan mana-mana pihak ketiga sebagai salah seorang rakan kongsi menggantikannya (lihat perenggan 39–40 & 43).

(5) Sanksi yang dikatakan Tra Mining telah mendapatkannya daripada pegawai pemegang harta bukan merupakan suatu sanksi. Surat yang dikeluarkan oleh Ketua Pengarah Insolvensi hanyalah mengakui bahawa Tra Mining merupakan pemilik sebenar hak dan kepentingan Syed Kharul Azhar dalam ARCI Enterprise menurut surat ikatan penyerahhakan yang dibuat antara pihak-pihak sebelum ini. Tetapi, menjadi pemilik yang sah ke atas hak dan kepentingan seorang rakan kongsi yang bankrap menurut suatu penyerahhakan muktamad tidak secara automatiknya menjadikan seorang yang diserah hak itu seorang rakan kongsi. Selanjutnya, sanksi yang dikatakan itu hanya diperoleh pada 18 Mei 2007, iaitu selepas pengemukaan petisyen penggulungan pada 16 April 2007 (lihat perenggan 51 & 53-54).

(6) Atas dasar ciri-ciri khusus yang terdapat pada suatu perkongsian, suatu penyerahhakan bahagian perkongsian oleh seorang rakan kongsi hanya memberi hak yang terhad sahaja kepada penerima hak. Jika seorang rakan kongsi menyerahhakkan bahagiannya, maka dia dengan itu memberikan suatu hak kepada penerima hak untuk membayar, apabila akaun perkongsian diambil, apa-apa yang boleh terakru kepada penyerah hak. Tetapi penerima hak tidak mendapat apa-apa hak lain selain ini; dan dia mengambil hak itu tertakluk kepada hak rakan kongsi yang lain; dan akan terkesan oleh ekuiti yang berbangkit antara penyerah hak dan rakan kongsinya selepas penyerahhakan itu, sama ada penyerahhakan itu mutlak atau sebaliknya. Walaupun penerima hak tidak menjadi rakan kongsi menggantikan penyerah hak, dia telah menggantikan penyerah hak dan oleh itu terikat untuk menanggung rugi apa-apa liabiliti hutang perkongsian itu. Dengan cara ini, penerima hak telah secara tidak langsung bertanggungan kepada perkongsian kerugian oleh penyerah hak. Hanya sebeginilah penerima hak mengisi kekosongan yang ditinggalkan rakan kongsi itu dan bukanlah penerima hak itu menjadi rakan kongsi menggantikan penyerah hak (lihat perenggan 42).]

**Notes**

For a case on power of attorney granted by partner of firm, see 1(2) *Mallal's Digest* (5th Ed, 2015) para 1524.

**Cases referred to**

*Bray v Fromont* (1821) 6 Madd 5 (refd)
*Crawshay v Maule* (1818) 1 Swan 495 (refd)
*Mohamed Tawfik bin Tun Dr Ismail v HLG Credit Sdn Bhd & Anor* [2011] MLJU 1010, CA (not folld)
*Ong Kian Loo v Hock Wah Trading Co & Ors* [1990] 1 MLJ 315, HC (refd)
*Slyth, Re, ex p Barrow* (1815) 2 Rose 252 (refd)

*Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal* [2012] 2 MLJ 299, FC (refd)

**Legislation referred to**

Bankruptcy Act 1967 s 38(1)(d)
Civil Law Act 1956 s 4(3)
Companies Act of 1948 [UK] ss 398(c), 399
Companies Act 1965 ss 314, 314(1), 315
Partnership Act 1961 ss 37, 40, 41
Rules of the High Court 1980 O 14A

*Amir Asree Meor Nordin (Zainul Rijal Talha & Amir) in Civil Appeal No W-02(IM)(NCC)-322–02 of 2013 for the appellant.*
*V Sithambaram (A Ruebankumar with him) (Ahmad Rizal, Sara Idylla & Co) in Civil Appeal No W-02(IM)(NCC)-323–02 of 2013 for the appellant.*
*Manpal Singh Sacdev (Vikram Singh, Rabinder Singh and Juliana Johari with him) (Rabinder, Budiman & Assoc) in Civil Appeal Nos W-02(IM)(NCC)-322–02 of 2013 and W-02(IM)(NCC)-323–02 of 2013 for the respondent.*

**Alizatul Khair JCA:**

INTRODUCTION

**[1]** These two appeals, Appeal Nos 322 and 323 were heard together before us as they both arose out of the same case.

**[2]** The appellant in Appeal No 322 was the second defendant in the court below while the appellant in Appeal No 323 was the first defendant in the court below.

**[3]** Both defendants appealed against the decision of the learned judicial commissioner ('the JC') of the High Court who had, after a full trial allowed the respondents' (the plaintiffs in the court below) claim as contained in the writ of summons and statement of claim for, inter alia, the following reliefs:

(a) the appointment of the appellant/second defendant as a provisional liquidator for ARCI Enterprise is invalid and be set aside;

(b) a declaration that the winding up order of the Malacca High Court dated 8 May 2008 to wind up ARCI Enterprise is invalid and be set aside;

(c) a declaration that the Malacca High Court order dated 8 May 2008 which appointed the appellant/second defendant as the liquidator of ARCI Enterprise is invalid and be set aside;

(d) the appellant/second defendant is ordered to give full details of the accounts of ARCI Enterprise at the point in time that he carried out his duties as the provisional liquidator and the liquidator; and

(e) the defendants be ordered to pay damages which is to be assessed by the court.

**[4]** Having given due consideration to both appeals, we have unanimously dismissed the appeals with costs. We now set out our reasons in so deciding. For ease of reference, parties will be referred to as they were referred to in the court below.

BACKGROUND FACTS

**[5]** As rightly observed by the learned JC in his grounds of judgment the dispute between the parties herein 'had spawned at least 9 cases and 4 reported ones' and that 'to recount its full history would be both tedious and tiresome'. As such we will only make a brief reference to the relevant history of the proceedings necessary for the disposal of the issue at hand. The pertinent facts are set out below.

**[6]** The plaintiffs together with one Syed Kharul Azhar bin Syed Talib and one Yee Chang Man were partners in a partnership named ARCI Enterprise (915175-X). ARCI Enterprise was formed on 8 October 1992 for a fixed term of eight years, expiring on 28 October 2000 ('the first ARCI Enterprise'). The purpose of the partnership was to carry out gold mining business on a piece of land situated in Kuala Lipis, Pahang. The partnership was granted a mining certificate by the state government to undertake gold mining business on the identified land.

**[7]** By a deed of assignment and execution of a power of attorney both dated 30 January 1997 Syed Kharul Azhar sold his rights, titles, and interests in the partnership to the first defendant for a consideration of RM4m. Vide the power of attorney, Syed Kharul Azhar named Cedric David Joseph Williamson ('Cedric Williamson'), a director of the first defendant at the material time, as his Attorney to 'do and perform all acts or things and/or exercise all powers and rights of the donor as a partner of the partnership'. Subsequently, a joint venture agreement dated 25 February 1997 was executed between all partners in the first ARCI Enterprise and the first defendant to carry out gold mining operations on the land.

**[8]** Yee Chang Man and Syed Kharul Azhar were respectively adjudicated bankrupts on 9 July 2003 and 19 April 2005. Another partner Yong Kat Keong passed away on 17 March 2009 and Yong Choong Yim ('the fourth plaintiff')

was appointed as administrator of the estate of the said Yong Kat Keong vide a court order dated 10 September 2009. A

**[9]** After the expiry of the eight years fixed term of the first ARCI Enterprise on 28 October 2000, a second partnership comprising the same seven partners was registered (registration No 1502428-X) with the same name on 29 July 2004 for a period of one year until 28 July 2005. ('the second ARCI Enterprise'). In the meantime, the Companies Commission of Malaysia revoked the business registration of the first ARCI Enterprise on 24 October 2005. On 12 January 2006 a third partnership with the same name was registered (registration No 1593482-D) but only with five surviving partners for a period of one year until 11 January 2007 ('the third ARCI Enterprise'). B C

**[10]** Meanwhile, Cedric Williamson, the Attorney of Syed Kharul Azhar gave a general notice to convene a creditor's meeting vide an advertisement in *The New Straits Times* on 27 April 2007. The creditor's meeting held on 11 May 2007 determined that the first ARCI Enterprise was insolvent. It was also decided in the meeting that the second defendant be appointed as the provisional liquidator for the said first ARCI Enterprise. D E

**[11]** After the creditor's meeting, the first defendant filed a winding up petition ('the petition') on 16 April 2007 at the Malacca High Court. In the petition, the first defendant sought an order to wind up the first ARCI Enterprise on the ground that the latter owed the first defendant, as creditor, a sum of RM6,157,121.57 as at 1 December 2008. The first defendant specifically relied on the provisions of ss 314 and 315 of the Companies Act 1965 to wind up the first ARCI Enterprise. At the same time, the first defendant had expressly stated in the petition that the first ARCI Enterprise consisted of *five partners* namely the first, second, third, fifth plaintiffs and Yong Kat Keong, excluding the two bankrupt partners. (Emphasis added.) F G

**[12]** The petitioner's solicitor only on the second defendant as provisional liquidator purportedly appointed in the earlier creditor's meeting held on 11 May 2007. The first ARCI Enterprise was wound up by the Malacca High Court on 8 May 2008 with the second defendant appointed as the liquidator. H

**[13]** Subsequent to the winding up order being made, the first ARCI Enterprise applied vide summons in chambers dated 13 June 2008 in the Malacca High Court to set aside the winding up order and for leave to be granted to the first ARCI Enterprise to file an affidavit of objection against the petition. On 8 July 2008 the winding up court dismissed the first ARCI Enterprise's application on the ground that the partnership should have appealed against the winding up order because the winding up court was *functus officio* and had no jurisdiction to set aside a perfected order. I

A **[14]** Dissatisfied with the winding up court's decision, on 29 December 2009 the plaintiffs, as contributories of the first ARCI Enterprise, filed a writ action in the Kuala Lumpur High Court, from which the appeals now before us emanate, against the defendants seeking the following orders:

B (a) the appointment of the second defendant as the provisional liquidator for the first ARCI Enterprise by the purported creditor's meeting held on 11 May 2007 is not valid in law and be set aside;

(b) a declaration that the order by the Malacca High Court dated 8 May 2008 which ordered the first ARCI Enterprise to be wound up is not valid C in law and be set aside;

(c) a declaration that the order by the Malacca High Court dated 8 May 2008 which ordered the appointment of the second defendant as a liquidator is not valid in law and be set aside;

D (d) an order that the second defendant shall give full details of the first ARCI Enterprise account at the time he executed his duty as provisional liquidator for the first ARCI Enterprise;

(e) an order for the defendants to pay damages to the plaintiff to be assessed E by the court;

(f) interest at 8%pa from date of judgment to realisation; and

(g) costs.

F **[15]** In the High Court, prior to the commencement of trial, the plaintiffs applied by summons in chambers to summarily set aside the winding up order and sought a further order that the first ARCI Enterprise be allowed to continue to conduct its business. The defendants on the other hand applied to strike out the plaintiffs' writ and statement of claim. The defendants' striking G out application was premised on the (lack of) jurisdiction of the High Court to set aside an order of another High Court.

**[16]** Instead of dealing with the parties' interlocutory applications, the learned High Court judge decided that the entire matter could be disposed of H by way of O 14A of the Rules of the High Court 1980 by determining the following two questions of law:

(a) whether the order of the Malacca High Court dated 8 May 2008 can be set aside by this court on the ground that it is a nullity ab initio?

I (b) and, if so, whether this court has jurisdiction to set aside an order of concurrent jurisdiction?

**[17]** The learned High Court judge concluded that the winding up order is a nullity *ab initio* as a partnership is excluded from the regime of the

Companies Act 1965. The court therefore set aside both the winding up order and the appointment of the second defendant as liquidator of the first ARCI Enterprise. The learned High Court judge also ordered that his decision pursuant to O 14A shall be the final order for the entire suit and in the result all pending interlocutory applications before the court were dismissed. Yet, in dismissing the defendants' striking out applications, the learned High Court judge stated his view that if not for his decision to set aside the winding up order he would have allowed the defendants' striking out applications.

**[18]** Dissatisfied with the decision, both parties appealed to the Court of Appeal. The Court of Appeal dismissed the defendants' appeal in relation to their striking out applications but allowed the plaintiffs' cross-appeal to have their writ and statement of claim reinstated. The defendants did not pursue the matter further.

**[19]** The plaintiffs on the other hand obtained leave and appealed to the Federal Court. In the Federal Court the plaintiff contended that it would be absurd for a partnership registered under the Partnership Act 1961 to also be categorised as an 'unregistered company' pursuant to s 314 of the Companies Act 1965. In the alternative, the plaintiff argued that even if the partnership was an unregistered company under s 314 of the Companies Act, it did not fulfil the requirements of s 314 in that it did not comprise more than five partners when the winding up petition was presented.

**[20]** The Federal Court dismissed the plaintiffs' appeal and remitted the entire action to the High Court for full trial. The Federal Court judgment is reported in *Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal* [2012] 2 MLJ 299. In dismissing the plaintiffs' appeal, the Federal Court opined, inter alia, as follows:

> [36] Part V of the Partnership Act 1961 deals with the dissolution of partnership. It is true as contended by learned counsel for the appellants that the court may decree a dissolution of a partnership under s 37 of the Partnership Act 1961. However, it must be noted that the application can be made only by a partner of a partnership. A creditor such as the respondents in the instant case cannot make an application under that s 37 to dissolve a partnership.
>
> [37] Dissolution is distinct from the 'winding up' of a partnership business. Although the term dissolution implies termination, dissolution is actually the beginning of the process that ultimately terminates a partnership. For example, if a partner resigns or if a partnership expels a partner, the partnership is considered legally dissolved. Section 40 of the Partnership Act 1961 provides that after the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership. Under s 41 of the Partnership Act 1961 any partner or his representative may, on the

termination of a partnership, apply to the court to wind up the business and affairs of the firm.

[38] It is therefore clear that under the Partnership Act 1961 only the partners can make application to court to dissolve and wind up a partnership. A creditor cannot make application under the Partnership Act 1961 to wind up a partnership. We are therefore of the view that s 314 of the Act is applicable in a situation where a creditor seeks a remedy against an insolvent partnership which has more than five members. Not all partnership can be wound up under s 314 of the Act. The circumstances under which a partnership may be wound up are stated under s 315(1) of the Act. There is therefore no doubt that s 314 and s 315 of the Act can co-exist with ss 40 and 41 of the Partnership Act 1961. The Partnership Act 1961 deals only with the voluntary winding up of a partnership by the partners themselves and no other. On the other hand s 315 expressly states that s 314 does not apply in the event a partnership is wound up voluntarily.

[39] The partnership was registered on 8 October 1992 for a period of 8 October 1992–28 October 2000. It must be noted that at the date of the winding up order the registration of the partnership was not renewed. However, the partners had continued to register two other partnerships in the same name of the firm with a different composition of partners and in the absence of few partners on the grounds of sale, death and/or bankruptcy. The subsequent partnership was registered on 29 July 2004 with registration No 001502428–X and the third and final partnership was registered from 12 January 2006 to 11 January 2007 under the registration No 001593482–D. Section 34(1)(a) of the Partnership Act 1961 provides that subject to any agreement between the partners, a partnership is dissolved if entered into for a fixed term, by the expiration of that term.

[40] *From the facts it is unclear what was the status of the partnership at the time of the presentation of the winding up petition at the Malacca High Court by the first defendant.*

[41] Learned counsel for the appellants submitted that as the partnership had only five partners at the time of the presentation of the winding up petition, which was on 16 April 2007, the partnership did not therefore fulfil the requirement of s 314 of the Act to be categorised as an unregistered company because s 314 provides that a partnership must comprise of more than five members. In response, learned counsel for the respondents submitted that s 314 of the Act does not say whether the requirement to have more than five members has be complied with at the time of the presentation of the winding up petition.

[42] It is to be noted that s 314 and s 315 of the Act are under division 5 of Part X of the Act which deals with the winding up of unregistered companies. It is therefore our unanimous view that the requirement of having more than five members must be complied with at the time of the presentation of the winding up petition. *The issue whether the partnership had more than five members at the time of the presentation of the winding up petition against the partnership was not considered by the learned High Court judge*.

*[43] The facts, in our view, are not clear whether the partnership had only five members at the time of the presentation of the winding up petition against the partnership at the*

*Malacca High Court. On the facts of the instant case we are of the view that the issue of how many members of the partnership were there at the time of the presentation of the winding up petition against the partnership could only be determined in a full trial where witnesses ought to be called and to be cross-examined so that full evidence on the matter are made available to the court for the court to make a proper finding on the issue.*

[44] For the reasons given we would answer the question posed to us as follows. A partnership with more than five members is an unregistered company and can be wound up under Part X of the Act by virtue of the definition of unregistered company in s 314(1) of the Act.

*[45] It is to be noted that the appellants appealed against only part of the judgment of the Court of Appeal, that is to say against the decision of the Court of Appeal which set aside the decision of the learned High Court judge that set aside the order of Malacca High Court dated 8 May 2008 given in Suit No 28–15 of 2007 and the appointment of the second defendant as a liquidator. In this appeal we are therefore only concerned with that part of the judgment of the Court of Appeal.* (Emphasis added.)

## PROCEEDINGS IN THE HIGH COURT

**[21]** When the entire action was remitted back to the High Court, it was heard before a different judicial commissioner. After a full trial (the defendants submitted no case to answer and called no witness to testify on their behalf), parties submitted at length in their respective written submissions on a host of other issues not otherwise identified as triable issues by the Federal Court, apart from the issue identified by the Federal Court to be determined by the said court, ie:

How many partners were there in the first ARCI Enterprise that was wound up by the winding up court on 8 May 2008 when the petition was filed on 18 April 2007 within the meaning of section 314(1) of the Companies Act 1965?

## DECISION OF THE HIGH COURT

**[22]** On 27 December 2012 the learned JC allowed the plaintiffs' claim. In allowing the plaintiffs' claim, the learned JC did not address all issues submitted before him. Instead, the learned JC confined his deliberation only to the issues pertaining to the locus standi of the plaintiffs ie the requirement for leave from the winding up court to institute a suit to set aside the and leave from the winding up court to bring an action against the provisional liquidator, *the number of partners of the first ARCI Enterprise when it was wound up*, the effect of setting aside the winding up order on the liquidator, and whether the first defendant as assignee was entitled to call for a creditors' meeting to appoint the second defendant provisional liquidator.

**[23]** In relation to the pivotal issue of the number of partners in the first ARCI Enterprise when it was wound up by the winding up court, the learned

JC made the following findings:

> ... the bankruptcy of Yee Chang Man and Syed Kharul Azhar would automatically by virtue of s 38(1)(d) of the Bankruptcy Act 1967 disqualify them as partners of the first ARCI Enterprise. Though the partnership was registered with seven partners, there were only five partners left at the point of presentation of the petition. In other words the first defendant had consciously disregarded the two bankrupts from the computation of the number of partners as five when it presented a winding up petition against the first ARCI Enterprise. Being a partnership of five partners, the law does not allow such a partnership to be wound up under s 314 of the Companies Act 1965 for it clearly refers to a partnership of more than five members. In *Re Bolton Benefit Loan Society Coop v Booth* (1879) 12 Ch D 679 it was held under the English equivalent of ss 199 and 200 of the Companies Act 1862 as follows:
>
> > Held, that, having regard to ss 199 and 200 of the Companies Act 1862, a winding up order could not be made when the number of members had at the date of the petition fallen below seven.
>
> ... As such the order made was made without jurisdiction and is null and void and as such I am constrained to have it set aside based on the principle set out in *Badiaddin*'s case.
>
> At any rate the first defendant had stated in its winding up petition against the first ARCI Enterprise that the partnership consisted of five partners ... It cannot now turn round and say that five partners mean also seven partners and as such it qualified to be wound up. Indeed it is estoppel from asserting otherwise ...

## PROCEEDINGS IN THE COURT OF APPEAL

**[24]** Before us, learned counsel for both parties confined their submissions only to the issue of the number of partners in the first ARCI Enterprise when the petition for winding up was presented before the winding up court.

## OUR PRELIMINARY OBSERVATIONS

**[25]** Based on the direction of the Federal Court when it remitted the matter back to the High Court for trial, it appears to us unmistakable that the Federal Court had only one issue in mind to be determined by the High Court. This is patently clear in para 43 of the Federal Court judgment. According to the Federal Court:

> [43] The facts, in our view, are not clear whether the partnership had only five members at the time of the presentation of the winding up petition against the partnership at the Malacca High Court. *On the facts of the instant case we are of the view that the issue of how many members of the partnership were there at the time of the presentation of the winding up petition against the partnership could only be determined in a full trial where witnesses ought to be called and to be cross-examined so that full evidence on the matter are made available to the court for the court to make a proper finding on the issue.* (Emphasis added.)

**[26]** We have perused the notes of evidence of the proceedings in the High Court and we observed that learned counsel for the defendants did in fact agree with the learned JC that the issue as singled out by the Federal Court on how many members of the partnership were there at the time of the presentation of the winding up petition was the 'prime issue' for trial (see pp 50–53 of the notes of proceedings in *RRT Bah B Jld* 2(9) of the record of appeal). A B

**[27]** We saw no reason to disagree with the view expressed by the learned JC at p 53 of the notes of proceedings that if the court were to come to a finding that the winding up order is invalid, in that the winding up court was not seized of the jurisdiction under s 314 and/or s 315 of the Companies Act 1965 to grant the impugned winding up order, 'it cuts right through' the entire case. A perusal of the notes of proceedings showed that learned counsel for the defendants clearly agreed to proceed on the single issue proposed by the learned JC. Learned counsel for the plaintiffs too agreed that if the question was answered in their favour 'it will solve everything' (see p 51 of the notes of proceedings). C D

**[28]** Nevertheless it would appear for some reasons not disclosed in the notes of evidence, that course was not eventually taken up by the parties. Instead, parties engaged the court below on a host of other issues not identified by the Federal Court for determination as adverted to earlier. E

**[29]** Be that as it may parties quite rightly agreed before us to confine their submission to the prime issue as identified by the Federal Court (*ante*). F

OUR FINDINGS

**[30]** It is an agreed fact that there were seven partners when the first ARCI Enterprise was formed on 8 October 1992. The first ARCI Enterprise was formed for a fixed term of eight years, expiring on 28 October 2000. The purpose of the partnership was to carry out gold mining business. It is common ground between the parties that Yee Chang Man and Syed Kharul Azhar were respectively adjudicated bankrupts on 9 July 2003 and 19 April 2005. Another partner Yong Kat Keong passed away on 17 March 2009 and Yong Choong Yim (the fourth plaintiff) was appointed as administrator of the estate of the said Yong Kat Keong vide a court order dated 10 September 2009. G H

**[31]** It is also an agreed fact that after expiry of the eight years fixed term of the first ARCI Enterprise on 28 October 2000, a second partnership comprising the same seven partners was registered (registration No 1502428-X) with the same name on 29 July 2004 for a period of one year until 28 July 2005. On 12 January 2006 a third partnership with the same name was registered (registration No 1593482-D) but only with five remaining I

A partners (excluding the two former partners who were adjudicated bankrupts) for a period of one year until 11 January 2007.

**[32]** It is also agreed that by a deed of assignment and a power of attorney both dated 30 January 1997, one of the partners Syed Kharul Azhar 'had sold all of his rights, titles and interests in the said ARCI partnership to the first defendant for the consideration (of RM4m). The first defendant had named Cedric Williamson (a director of the first defendant at the material time) as its Attorney, to be the Attorney of Syed Kharul Azhar in the said ARCI partnership'. It has also been agreed upon that a joint venture agreement dated 25 February 1997 was executed between all of the partners in the first ARCI Enterprise and the first defendant to collaborate in the mining operations.

**[33]** It was the defendants' contention that by virtue of the said assignment and the appointment of the said Cedric Williamson as attorney of Syed Kharul Azhar vide the power of attorney executed on 30 January 1997 pursuant to the said assignment the said Cedric Williamson had stepped into the shoes of Syed Kharul Azhar and substituted as a partner of the first ARCI Enterprise. That being the case, the bankruptcy of Syed Kharul Azhar in 2005 had no effect on his status as a partner since he had been substituted as a partner by Cedric Williamson pursuant to the said assignment and his appointment as the former's attorney in 1997.

**[34]** Learned counsel for the defendants relied on s 4(3) of the Civil Law Act 1956 and the Court of Appeal case of *Mohamed Tawfik bin Tun Dr Ismail v HLG Credit Sdn Bhd & Anor* [2011] MLJU 1010 in support of their contention.

**[35]** In our view the above case does not apply to the facts of our case as it does not concern a partnership.

Firstly, before determining whether the said assignment and the consequent appointment of Cedric Williamson as the said attorney has the effect as contended, it is of course trite that by virtue of s 38(1)(d) of the Bankruptcy Act 1967, a bankrupt is prohibited from, inter alia, entering into or carrying on any business either alone or in *partnership* unless he has obtained sanction from the Director General of Insolvency ('DGI') or the permission of the court. The issue of the sanction from the DGI will be dealt with later in the judgment.

**[36]** Secondly, it is patently clear that the appointment of Cedric Williamson as attorney of Syed Kharul Azhar was tied up with the deed of assignment dated 30 January 1997. Clause 6 of the deed of assignment expressly states that the appointment of Cedric Williamson is to enable the attorney 'to do and sign all things or documents required by (the first defendant

as assignee) to give effect to the (absolute assignment in Clause 5(I))'. Clause 1–6 of the power of attorney dated 30 January 1997 however are drafted in general words which appear to confer general powers to the attorney to exercise all the powers and rights of the assignor-donor as a partner in the partnership.

**[37]** The law on the construction of powers of attorney is settled. Powers of attorney are strictly construed and are interpreted as giving only such authority as they confer expressly or by necessary implication. It is an entrenched rule of construction that general words do not confer general powers, but are limited to the purpose for which the authority is given (para (3–011) *Bowstead & Reynolds On Agency*, (20th Ed) Sweet & Maxwell). The purpose here being the purpose set out in cl 6 of the said assignment.

**[38]** Thirdly, and more importantly a partnership is personal in character as explained by Lindley & Banks in their book *Lindley & Banks on Partnership* at paras 19–49, which we reproduce below:

> When persons enter into a contract of partnership, their intention ordinarily is that a partnership shall exist between themselves and themselves alone. The mutual confidence reposed by each in the other is one of the main elements in the contract, and it is obvious that persons may be willing enough to trust each other, and yet be unwilling to place the same trust in any one else. Hence it is one of the fundamental principles of partnership law that no person can be introduced as a partner without the consent of all those who for the time being are members of the firm. If, therefore, a partner dies, his executors or devisees have no right to insist on being admitted into partnership with the surviving partners, unless some agreement to that effect has been entered into by them. *Still less can a partner by assigning his share entitle his assignee to take his place in the partnership against the will of the other members* ... (Emphasis added.)

**[39]** The same passage which appeared in the case of *Ong Kian Loo v Hock Wah Trading Co & Ors* [1990] 1 MLJ 315 was relied on by the learned JC to illustrate the same point (see pp 48–49 of *RRT Bah A Jld* 1(2)). Thus, according to the fundamental principles of partnership law, subject to any agreement express or implied between the partners, no person may be introduced as a partner without the consent of all existing partners (*Crawshay v Maule* (1818) 1 Swan 495 at p 509n). An attempt by one partner to introduce a new partner without consent amounts only to an assignment of part of his share in the partnership (*Slyth, Re, ex p Barrow* (1815) 2 Rose 252 at p 255; *Bray v Fromont* (1821) 6 Madd 5).

**[40]** The fact that Cedric Williamson signed the joint venture agreement as attorney of Sye Kharul Azhar did not mean that the other partners had

consented to or even acknowledged Cedric Williamson as a partner in place of Syed Kharul Azhar.

**[41]** As pointed out by learned counsel for the plaintiff it is clear from cl 1 of the power of attorney that the donor ie Syed Kharul Azhar remains a partner of the first ARCI Enterprise. Clause 1 reads, inter alia, as follows:

> To do and perform all acts or things and/or all the powers and rights of *the Donor as a Partner* of the Partnership ... (Emphasis added.)

**[42]** Due to this personal character that underpins a partnership, an assignment by a partner of his partnership share entitles the assignee to limited rights only (para 124 *Halsbury's Law of England* (5th Ed) Vol 79). If a partner does assign his share, he thereby confers upon the assignee a right to payment of what, upon the taking the accounts of the partnership, may be due to the assignor. But the assignee acquires no other right than this; and he takes subject to the rights of the other partners; and will be affected by equities arising between the assignor and his co-partners subsequent to the assignment (para 19–53 *Lindley & Banks on Partnership*). This is so irrespective of whether the assignment is absolute or otherwise (para 125 *Halsbury's Law of England* (5th Ed) Vol 79). Although the assignee does not become a partner in place of the assignor, he effectively stands in his shoes and is accordingly bound to indemnify the assignor against any liability for the partnership debts. In this way, the assignee will be indirectly liable for the assignor's share of any losses (para 19–57 *Lindley & Banks on Partnership*). It is only in this sense that the assignee (ie Cedric Williamson in this case) steps into the shoes of the partner (Syed Kharul Azhar) and not as suggested by learned counsel for the defendants, that is, the assignee becomes a partner in place of the assignor.

**[43]** We however noted that a partnership agreement may, exceptionally, give a partner the right to transfer his share to a third party and, thereby, to constitute that third party a partner in his place: If partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not; nor why, having so agreed, they should not be bound by the agreement. Persons who enter into such an agreement consent prospectively and once and for all to admit into partnership any person who is willing to take advantage of their agreement, and to observe those stipulations, if any, which may be made conditions of his admission (para 19–60 *Lindley & Banks on Partnership*). In the case at hand, there was no such agreement, or rather no evidence of such agreement. It was neither the defendants' case in the winding up court nor in the court below that there was such agreement between the partners in the first ARCI Enterprise.

**[44]** Fourthly after the creditor's meeting, the first defendant filed a winding up petition on 16 April 2007 at the Malacca High Court. In the petition, the

first defendant sought an order to wind up the first ARCI Enterprise on the ground that the first partnership owed the first defendant a sum of RM6,157,121.57 as at 1 December 2008. To be specific, it was set out in the petition that:

> 1. *ARCI Enterprise was a valid and existing partnership comprising of Yee Fook Shin, Thein Hong Teck, Yee Fook Choy, Yee Chong Khoon, Yong Kat Keong.*
>
> ...
>
> 6. The partnership is indebted to the petitioner in the sum of RM6,157,121.57 as at 1.12.2008 via suit in Kuantan High Court, Writ Summons ...
>
> ...
>
> 10. The Partnership is therefore unable to pay its debts.
>
> 11. In the circumstances, it is just and equitable that the Partnership be wound up.
>
> Your Petitioner therefore humbly pray as follows:
>
> (a) *that the Partnership be wound up by the court under the provisions of section 314 and section 315 of the Companies Act 1965*;
>
> (b) that (the 2nd defendant) be appointed as the Liquidator of the Partnership;
>
> (c) that the costs of and incidental to this Petition be paid out of the assets of the Partnership. (Emphasis added.)

**[45]** The interplay between the winding up provisions in the Partnership Act 1961 and ss 314 and 315 of the Companies Act 1965 has been conclusively answered by the Federal Court in the previous appeal brought by the same parties herein. We have at the outset of this judgment reproduced in extenso the relevant paragraphs from the said Federal Court written judgment (paras 36–38 in *Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal* [2012] 2 MLJ 299).

**[46]** In short, the Federal Court held that 'a creditor such as the (first defendant) cannot make an application under s 37 (of the Partnership Act) to dissolve a partnership', that 'under the Partnership Act 1961 only the partners can make application to court to dissolve and wind up a partnership'; that 'a creditor cannot make application under the Partnership Act 1961 to wind up a partnership'; that 'section 314 of the (Companies Act) is applicable in a situation where a creditor seeks a remedy against an insolvent partnership which has more than five members'; that 's 314 and s 315 of the (Companies Act) can co-exist with ss 40 and 41 of the Partnership Act 1961'; that 'the Partnership Act 1961 deals only with the voluntary winding up of a partnership by the partners themselves and no other (while) s 315 expressly

A states that s 314 does not apply in the event a partnership is wound up voluntarily'.

**[47]** Most importantly, for the purpose of this appeal, the Federal Court has determined that:

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> [42] It is to be noted that s 314 and s 315 of the Act are under division 5 of Part X of the Act which deals with the winding up of unregistered companies. It is therefore our unanimous view that *the requirement of having more than five members must be complied with at the time of the presentation of the winding up petition.* (Emphasis added.)

C

**[48]** As stated earlier it is only in respect of whether the first ARCI Enterprise had more than five members at the time of the presentation of the winding up petition that the case was remitted for trial in the High Court.

D

**[49]** In their submissions before us, learned counsel for the defendants did not deny that only five partners were named in the first defendant's winding up petition. However learned counsel contended that despite the bankruptcies of Yee Chang Man and Syed Kharul Azhar prior to the first defendant filing of the

E winding up petition, by virtue of the fact that the first defendant has obtained a sanction dated 18 May 2007 from the official assignee to maintain the rights and interests of the assignor Syed Kharul Azhar, the assignor though a bankrupt, would be considered a member of the partnership within the

F meaning of s 314(1) of the Companies Act 1965. Secondly, learned counsel for the defendants argued that the issue of estoppel does not arise and this court is not prevented from relying on the business registration of the first ARCI Enterprise which shows the actual number of partners as consisting seven partners.

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**[50]** We find no merits in both contentions. Sections 398(c) and 399 of the English Companies Act of 1948 are the equipollents of our corresponding ss 314 and 315 of the Companies Act 1965, except that there the minimum members required are eight whereas in our case are five. In *Halsbury's Laws of*

H *England* (3rd Ed), Vol 6 the learned author explains that:

> 1613 Number of members required. A company which consists of less than eight members is not an unregistered company for the purpose of winding up. *It is insufficient if there have been, although there are not at the date of the presentation of the winding up petition, at least eight members* (*Re Bolton Benefit Loan Society, Coop v Booth* (1879) 12 Ch D 679). It is sufficient if eight persons admit that they are members and that the association is insolvent (*Re South of France Pottery Works Syndicate* (1877) 36 LT 651). *The word 'members', as used above, means existing members; and does not include the representatives of deceased members or the trustees of bankrupt members as such, or past members* (*Re Bolton Benefit Loan Society, Coop v*

I

*Booth* (1879) 12 Ch D 679; *Re Bowling and Welby's Contract* [1895] 1 Ch 663, CA). (Emphasis added.)

**[51]** From the excerpts, it is irrefutably clear that the requirement of having more than five members must be complied with at the time of the presentation of the winding up petition and not later. In this case, it is obvious that the alleged sanction from the official receiver was only obtained by the first defendant on 18 May 2007, which was after the presentation of the winding up petition by the first defendant on 16 April 2007. Although, as alternatively argued by the defendants here, the business registration record showed that the first ARCI Enterprise comprised seven partners, nevertheless on presentation of the winding up petition it is undeniable that only five partners remained solvent, consistent with the first defendant's own pleaded facts in the winding up petition.

**[52]** The authorities referred to in *Halsbury* have also established beyond doubt that by 'members' it does not include trustees of bankrupt members. In the instant case, upon being adjudicated a bankrupt, the official assignee took on the role as trustee in bankruptcy of Syed Kharul Azhar. Since the position is that even a trustee of a bankrupt member could not be considered as a 'member', in the instant case, regardless of whether the first defendant has obtained any sanction from the official assignee, by necessary implication, the first defendant (or for the matter the bankrupt partner himself), could not be regarded as a 'member' for the purpose of determining the number of members required under s 314 of the Companies Act 1965.

**[53]** Next, about the alleged 'sanction' dated 18 May 2007 obtained from the official assignee, having perused the document, we find that there was actually no sanction being granted by the official assignee. In fact, this is very clear from the letter which says:

> 2. Ketua Pengarah Insolvensi bersetuju dengan permintaan tuan bahawa hak dan kepentingan sibankrap Syed Kharul Azhar bin Syed Talib dalam perkongsian ARCI Enterprise diserahkan kepada TRA Mining sepertimana perjanjian yang dimasuki oleh pihak berkenaan bertarikh 30 January 1997. Ini adalah kerana tarikh Penerimaan dan Perintah Penghukuman dibuat terhadap bankrap ialah pada 19.4.2005, hamper 8 tahun selepas perjanjian tersebut.
>
> 3. ... (pihak) Tuan telah diiktiraf (acknowledge) sebagai pemilik hak sibankrap dan terpulang kepada tuan untuk mengambil tindakan selanjutnya.

**[54]** It is apparent that the letter issued by the Director General of Insolvency 'acknowledged' (to borrow the word used in the letter) the first defendant as the rightful owner of the bankrupt partner's rights and interests in the first ARCI Enterprise pursuant to the deed of assignment entered into between the parties previously. But as we have shown earlier, being the rightful

owner of a bankrupt partner's rights and interests pursuant to an absolute assignment does not automatically turn an assignee into a partner (see paras 38–43 of this judgment, *ante*).

OUR DECISION

**[55]** Thus, for the reasons outlined above, we concurred with the learned JC's finding that at the time of the presentation of the winding up petition at the Malacca High Court there were only five partners left and therefore by virtue of s 314 of the Companies Act 1965, it was not a partnership that could be wound up under s 315 of the said Act, being a partnership comprising of less than seven members. As correctly found by the learned JC, the order of winding up by the Malacca High Court was made without jurisdiction and was therefore null and void.

**[56]** In the premises we were unanimously of the view that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Reported by Ashok Kumar